

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CIVIL ACTION NO.
)	2:93CV77(FIP)
)	
v.)	FILED: 6/10/93
)	
CANSTAR SPORTS USA, INC.,)	
)	
Defendant.)	

GOVERNMENT'S RESPONSE TO JARED COHEN'S
MOTION FOR ADMISSION PRO HOC VICE

On June 1, 1993, the government received notice that a non-party to the captioned civil antitrust action, Jared Cohen, counsel to Sportswear Design, Inc., had filed a motion with this court seeking to address the court in oral argument and to submit a brief and materials directed to the final judgment proposed in this case.

The government has no objection to the motion insofar as the movants seek an opportunity to informally submit and amicus brief or affidavits to the court, nor does the government object to the movants having an additional two weeks to prepare their submissions. The government takes no position on the movants' request for an opportunity to address the court in oral argument and leaves that to the court's discretion. However, to the extent that the subject motion might be intended to seek formal intervention in this case, the government submits this brief in opposition.

MOVANTS ARE NOT ENTITLED TO INTERVENE
AS A MATTER OF RIGHT

Although the motion makes no mention of it, the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16(f)(3), prescribes the circumstances under which intervention in consent decree review proceedings may occur. The statute expressly provides that a court may, but is not required to, permit intervention pursuant to the Federal Rules of Civil Procedure. The APPA confers no absolute right to intervene in the review process; rather, intervention is committed entirely to the court's discretion. United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 647 (D. Del. 1983); United States v. Am. Tel. & Tel Co., 552 F. Supp. 131 (D.D.C. 1983), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). Furthermore, the statute provides that would-be intervenors must show that they meet the eligibility requirements of the Federal Rules of Civil Procedure, which are set forth in Rule 24. See Heileman, supra.

Rule 24 governs and provides for intervention as a matter of right (24(a)) and permissive intervention (24(b)). The movants' motion does not indicate whether they seek intervention or, if they do, whether they do so pursuant to subsection (a) or (b) of Rule 24 or both subsections.

It is clear that the movants are not entitled to intervene as a matter of right under Rule 24(a) since (1) no United States statute, including the APPA, confers an unconditional right to intervene in civil antitrust actions; the APPA provides for intervention in the court's discretion only; and (2) the movants

can claim no interest in the property or transaction which is the subject of this action with respect to which they are so situated that a disposition of the action may impair or impede their ability to protect said interest, which interest is not adequately represented by the plaintiff-government.

The movants have so far made only a vague reference to a "dire need for additional care and caution in constructing a final judgment that adequately protects both retailers . . . and Michigan consumers . . . They do not meet the Rules' requirement of an "interest relating to the . . . transaction." They also have not shown that the disposition of the action would impair or impede their ability to protect any interest they might have. Finally, in government antitrust consent decree proceedings, it has consistently been held that a private party will not be permitted to intervene as of right absent a showing that the government has failed "fairly, vigorously and faithfully" to represent the public interest. United States v. American Cyanamid Co., 556 F. Supp. 357, 360 (S.D.N.Y. 1982); United States v. Ciba Corp., 50 F.R.D. 507, 513 (S.D.N.Y. 1970); see also Sam Fox Publishing Co., Inc. v. United States, 366 U.S. 683, 686 (1960); United States v. Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶64,782 (D.D.C. 1982); United States v. Carrols Development Corp., 454 F. Supp. 1215 (N.D.N.Y. 1978); United States v. Hartford-Empire Co., 573 F.2d 1 (6th Cir. 1978); United States v. Mid-American Dairyman, Inc., 1977-1 Trade Cas. (CCH) ¶61,508 (W.D. Mo. 1977); United States v. Associated Milk Producers.

Inc., 534 F.2d 113 (8th Cir.), cert. denied sub nom. National Farmers' Organization, Inc. v. United States, 429 U.S. 940 (1976); United States v. Paramount Pictures, Inc., 333 F. Supp. 1100 (S.D.N.Y. 1971), aff'd, Syufy Enterprises v. United States, 404 U.S. 802 (1971).

. . . [T]he interest justifying intervention as of right in an antitrust suit brought by the United State must be substantial, must lie at the center of the controversy, and must be shown clearly, in the language of the Rule, [Fed. R. Civ. P. 24(a)] to be less than "adequately represented" by the Department of Justice. This would appear to harmonize fairly the procedural aims of Rule and the perhaps more fundamental principles governing the role of the Attorney General of the United States in representing the "public interest" in federal antitrust proceedings. United States v. Ciba Corp., supra at p.513

Movants herein have not shown the required justification.

MOVANTS HAVE NOT MADE A SHOWING SUFFICIENT
TO ENTITLE THEM TO BE PERMITTED TO INTERVENE

Rule 24(b) of the Federal Rules of Civil Procedure governs permissive intervention. It provides that intervention may be permitted

(1) when a statute of the United States confers a conditional right to intervene; or
(2) when an applicant's claim or defense and the main action have a question of law or fact in common In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Section 2(e) of the Antitrust Procedures and Penalties Act (15 U.S.C. §16(e)) requires a court, before entering any proposed antitrust consent judgment to determine that the entry

of the judgment is in the public interest. For the express purpose of assisting the courts in making this determination, Section 2(f) of the Act provides that a court may

. . . (3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate.

Section 2(f)(3) does not confer any right, conditional or otherwise, upon third persons to intervene in Government antitrust actions. It simply provides a tool which a court may, in its discretion, employ in reaching the required public interest determination. Heileman, 563 F. Supp. At 648; United States v. Am. Tel. & Tel. Co., 1982-2 Trade Cas. (CCH) ¶64,726, 71,524 (D.D.C. 1982); United States v. Assoc. Milk Producers, Inc., 394 F. Supp. 29, 41 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied sub nom. National Farmers Organization, Inc. v. United States, 429 U.S. 940 (1976).

The movants have not shown in their motion why intervention in this action is necessary to enable this court to make its public interest determination under section 2(e) of the APPA, which showing they must make the gain status as an intervenor. United States v. LTV Corp., 746 F.2d 51, 54 (D.C. Cir. 1984); Hartford-Empire Co., 573 F.2d at 2; Assoc. Milk Producers, 534 F.2d at 113; Heileman, 563 F. Supp. At 649; Stroh Brewing Co.,

1982-2 Trade Cas. (CCH) at ¶71,960. The government has filed with the court and published a comprehensive Competitive Impact Statement pursuant to Section 2(b) and (c) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16 (b) and (c)). Pursuant to Section 2(g) of such Act (15 U.S.C. § 16 (b) and (g)), the defendant filed a statement with the court on March 26, 1993, asserting that it has not had any communication with any officers or employees of the government concerning the proposed judgment except for communications involving counsel. The movants have requested, and the government has not opposed, an opportunity to submit a brief and materials directed to the proposed final judgment. Movants have also requested an opportunity to address the court through oral argument. The government submits that the totality of these procedures are fully sufficient to serve the public interest and assist the court in determining whether the proposed final judgment is in the public interest. Accordingly, to the extent that movants

are seeking to intervene in this case, their motion should be denied.

Dated: New York, New York
June , 1993

Respectfully submitted,

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